

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

08 CRIM 361 (PAC)

JAMES BONCZEK,

Defendant.

**DECLARATION OF SUSAN R. NECHELES, ESQ. IN SUPPORT
OF DEFENDANT JAMES BONCZEK'S MOTION FOR FORENSIC
REVIEW OF COMPUTER EVIDENCE**

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN R. NECHELES hereby declares under penalty of perjury:

1. I am an attorney duly admitted to practice in this Court. I am a partner in the law firm of Hafetz & Necheles, counsel to the defendant James Bonczek in the above-captioned action. I submit this declaration and the attached exhibits in support of Mr. Bonczek's motion for forensic review of computer evidence using a Macintosh-based forensic computer and Macintosh-based forensic software.

2. In order to properly defend this case, I must perform a forensic review of the computer evidence seized from the apartment of Mr. Bonczek.

3. Accordingly, I retained Michael G. Kessler of Kessler International to assist with such review.

4. Mr. Kessler, a former law enforcement officer, is an expert in computer forensic investigation.

5. Mr. Kessler informed me that because Mr. Bonczek's computers are Apple Macintosh computers, the forensic review must take place using Macintosh computers running Macintosh-based forensic software.

6. 18 U.S.C. § 3509(m) regulates how child pornography is to be produced for purposes of discovery in a criminal case. I had several discussions with AUSA Kasulis regarding my review of the computer evidence in light of section 3909(m)'s restrictions.

7. I requested of Mr. Kasulis that the defense be allowed to examine the evidence using Apple Macintosh computers and Macintosh-based forensic software. Mr. Kasulis responded that an Apple Macintosh computer was not available to the government.

8. In order that the defense review begin promptly, I entered into a stipulation with Mr. Kasulis providing that Mr. Kessler would review the computer on a government-provided Windows-based computer. The stipulation also provided that the defense retained its right to seek relief from the Court with respect to review on a Macintosh computer with Macintosh-based software, if necessary.

9. A copy of the June 26, 2008 stipulation is attached hereto as Exhibit A.

10. Mr. Kessler has spent approximately 32 hours reviewing the computers using a Windows-based forensic computer, and has not been able to obtain the information necessary to the defense of this case.

11. The government has retained a computer forensics firm in connection with the analysis of Mr. Bonczek's computers. On May 16, 2008, the government produced to me a computer disk containing forensic computer files. These files indicate that the government's expert reviewed the computers using Macintosh forensic computers with Macintosh-based forensic software.

12. A copy of the forensic computer files produced by the government is attached hereto as Exhibit B.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2008.

s/
Susan R. Necheles

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STIPULATION

Upon stipulation of the parties,

IT IS HEREBY AGREED that, because pursuant to 18 U.S.C. § 3509(m), courts are required to deny defense requests to copy, photograph, duplicate, or otherwise reproduce material constituting child pornography if the Government makes the material reasonably available to the defendant and provides ample opportunity for the defense to examine it at a government facility, 18 U.S.C. § 3509(m), the Government shall make available to the defense raw DD images or "mirror" copies of the computers, stand-alone hard drives, and digital storage media seized in this case (collectively, the "Mirror Copies") for review at the United States Attorney's Office for the Southern District of New York; and it is further

AGREED that the Mirror Copies may only be viewed by Susan R. Necheles, Esq. and Joshua R. Geller, Esq., counsel for the defendant, persons working under their direction and supervision for the purpose of assisting them in the defense of this matter, and Michael G. Kessler and his professional associates or other substitute computer experts designated by Kessler International to assist Ms. Necheles and Mr. Geller in this matter (collectively, the "Defense Team"); and it is further

AGREED that the Defense Team shall not duplicate or distribute the Mirror Copies to any other person. Nor shall any member of the Defense Team willfully destroy, erase or alter anything on the Mirror Copies; and it is further

AGREED that no person other than a member of the Defense Team shall be allowed to examine the Mirror Copies without further agreement of the parties or order of the Court; and it is further

AGREED that the Mirror Copies may not be connected, uploaded or transferred to the Internet and may not be placed into any computer that is connected to the Internet; and it is further

AGREED that the computer forensic examination of the Mirror Copies may be conducted at the United States Attorney's Office for the Southern District of New York, on scheduled appointment dates during regular business hours Monday through Friday from 8:00 a.m. to 5:00 p.m. (EST). The Government shall make all reasonable efforts to accommodate request for review within 24 hours. The examination of the Mirror Copies shall be conducted at a stand-alone forensics review workstation in an interview room monitored by a closed circuit television ("CCTV") camera. No Government agents will be present in the room while the Defense Team is conducting its examination of the Mirror Copies, and the CCTV camera shall be a video-only feed, without audio capability. The video monitoring shall be limited to that required to ensure the integrity of Government space and property, and the security of its occupants; the video feed shall not be of sufficient detail or positioning that would reveal defense strategy. The Government shall make no attempt to record any audio from the workstation, nor be able to observe the Defense Team's work product or computer monitor screen at any time. The Defense Team shall be permitted to review the video feed from the CCTV camera at any time while conducting their review to ensure that these conditions are met; and it is further

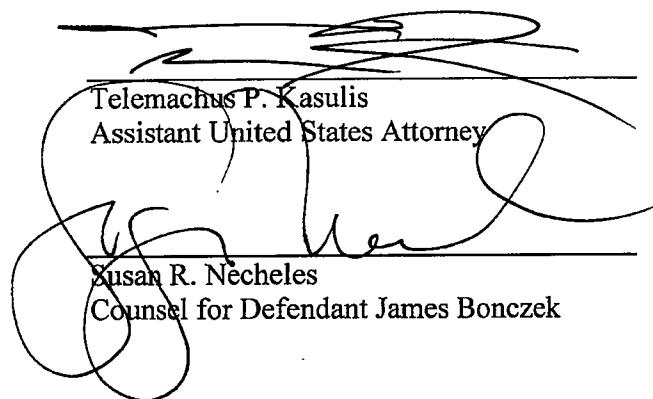
AGREED that the Defense Team shall be permitted to copy any file from the Mirror Copies that is not contraband, or take screen shots of or copy any data associated with any file, including data associated with contraband files, so long as no contraband files or images are copied, and to compile a report (without contraband images/videos) documenting the examination on removable media at the discretion of the defense expert. The Government will make available a CD/DVD burner and disks to copy any such report and any non-contraband files onto optical media; or the Defense Team may provide their own equipment for such purpose; and it is further

AGREED that the Government understands and agrees that all evidence of the examination on the stand-alone workstation provided by the Government or work done by the Defense Team is privileged attorney-client work product and the Government agrees that no Government agent will review the Defense Team's work product, to include any configurations of the provided workstation, at any time during or after the conclusion of the forensic review. Such review includes, but is not limited to, the use of FTK's logging function, keystroke monitors, or other logging software on the provided workstation to monitor the Defense Team's investigation; and it is further

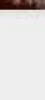
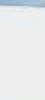
AGREED that it is understood that the Defendant has requested and still intends to seek the right to use his expert's own computer equipment and software for further forensic testing, if necessary, and to review the Belkin Router seized in this case, and that the Government continues to reserve its right to object to such a request at the appropriate time. In addition, by entering this agreement the parties do not waive their right to challenge each others' performance pursuant to this agreement or to otherwise move the Court for additional relief with respect to the inspection of the evidence seized in this case.

Dated: New York, New York

June 26, 2008


Telemachus P. Kasulis
Assistant United States Attorney

Susan R. Necheles
Counsel for Defendant James Bonczek

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